United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1031

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

JCS:sr

d-512

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREWS PLAZA
NEW YORK, NEW YORK 10007

B Pfs

April 14, 1976

Daniel A. Fusaro, Chief Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: United States of America v. Charles Bradley, Docket No. 76-1031

Dear Mr. Fusaro:

Attached please find the Government's response to Appellant Bradley's Supplemental Brief in the above-captioned case. This response is filed today in letter form pursuant to the order of the Honorable Wilfred Feinberg, Circuit Judge, dated March 23, 1976.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: Constance Cushman
CONSTANCE CUSHMAN
Assistant United States Attorney

Attachments

POINT IV

The trial court's advisory ruling permitting the Government to impeach defendant Bradley, if he testified, by evidence of his prior petit larceny conviction was entirely correct.

At the close of the Government's case, defense counsel requested a ruling from Judge Carter on whether the Government would be allowed to use the fact of Bradley's six and one-half year old petit larceny conviction to impeach him should he take the stand.* The trial court ruled that the Government would be permitted to do so (Tr. 97-98).

Rule 609(a)(2), Federal Rules of Evidence, permits impeachment of a defendant who testified by the introduction of evidence of his prior misdemeanor or felony conviction, if the crime "involved dishonesty or false statement."

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* Bradley had been arrested and charged with petit larceny and criminal possession of stolen property in the third degree, in violation of N. Y. Penal Law §§155.25 and 165.40, in that he took packages containing clothes from Nisner Brothers, 309 West 37th Street, New York City. He pleaded guilty to attempted petit larceny, in violation of N. Y. Penal Law §§110, 155.25. The details of that conviction were not before Judge Carter at the time he made his ruling below.

Relying on the Third Circuit's recent decision in Government of the Virgin Islands v. Toto, Dkt. No. 75-1312 (3d Cir. Jan. 29, 1976), Bradley contends that the phrase "dishonesty or false statement," as employed in Rule 609(a)(2), was intended by Congress to include only those crimes which fall within the more limited definition of the historic category of "crimen falsi,"* and therefore to exclude offenses such as theft, larceny

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* As defined in pertinent part in Black's Law Dictionary 146-147 (rev. 4th ed. 1968):

> CRIMEN FALSI. The term involves the element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud. . . . A crime less than felony that by its nature tends to cast doubt on the veracity of one who commits it. . . . This phrase is also used as a general designation of a class of offenses, including all such as involve deceit or falsification; e.g., forgery, counterfeiting, using false weights or measures, perjury, etc. Includes forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice.

and, specifically, petit larceny.* The trial court's advisory ruling, he contends, was therefore in error and, since allegedly it prevented him from testifying in his own defense, so prejudiced his trial as to require reversal.

Bradley's argument overlooks the plain fact that, for several reasons, the court's ruling caused him no prejudice whatever and is, therefore, at most harmless error, and not grounds for reversal. See United States v. Turcotte, 515 F.2d 145, 152 (2d Cir. 1975); United States v. Dilts, 501 F.2d 531 (7th Cir. 1974), United States v. Plante, 472 F.2d 829 (1st Cir.), cert. denied, 411 U.S. 950 (1973); United States v. Glasser, 443 F.2d

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* Although the Third Circuit's construction of Rule 609(a)(2) in Toto is dictum -- in view of the fact that the trial in issue there had occurred before July 1, 1975, the effective date of the new Federal Rules of Evidence -- its decision in Government of the Virgin Islands v. Testamark, Dkt. No. 75-1911 (3d Cir. Jan. 29, 1976) constitutes a clear holding that under Rule 609(a)(2) a defendant may not be impeached with the fact of his conviction for petit larceny.

994, 1003, 1005 (2d Cir.), cert. denied, 404 U.S. 854 (1971); cf. Rothschild v. State of New York, 525 F.2d 686, 687 (2d Cir. 1975); United States v. Williams, 523 F.2d 407, 409-410 n.2 (2d Cir. 1975).

Moreover, the trial court's ruling was correct on the merits and fully supported by the purpose and language of Rule 609 as finally formulated, by its legislative history, and by the prior law of this Circuit, which the Rule was not intended to change.

First, since Bradley did not testify and was not cross-examined, evidence of his prior petit larceny conviction was never placed before the jury. Thus, even assuming, arguendo, that the trial court erred in determining to allow impeachment of Bradley on the basis of that conviction, the latter clearly was never considered by the jury and could not improperly have influenced them in their deliberations.

Second, as the record clearly shows and contrary to Bradley's claims on this appeal, the trial court's ruling on this issue was immaterial to Bradley's decision not to testify. Bradley's counsel represented to Judge Carter on the record, after the ruling complained of here, that he intended to present evidence in the

defense case (Tr. 98). It is clear from the colloquy between court and counsel the following morning that -- notwithstanding Judge Carter's earlier advisory ruling permitting the Government to impeach Bradley with the fact of his petit larceny conviction -- the defense planned to offer in its own case Bradley's own testimony to the effect that he had not endorsed the check, but that "Tony" had done so, authorizing Bradley to cash it (Tr. 100-104).

Bradley's plan to testify was abruptly cancelled, however, when, and only when, the trial court ruled it would permit the Government to offer in rebuttal expert witness testimony of handwriting analyses positively identifying the handwritten endorsement on the check as Bradley's. "[B]ased on the Court's ruling and the discovery [of the expert witness identification] mentioned by [the Assistant United States Attorney], . . . the defense . . . rest[ed]." (Tr. 104).

Apart from considerations of prejudice, however, the trial court's ruling was entirely correct on the merits.

Rule 609(a) permits impeachment of a defendant by use of prior felony or misdemeanor convictions for crimes "which involve dishonesty or false statement," without first weighing the probative value of that evidence against possible prejudice to defendant. As the Report of the Joint Conference Committee on the proposed Federal Rules of Evidence expressly stated:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H. R. Conf. Rep. No. 93-1597 to accompany H. R. 5463, 93d Cong., 2d Sess. 9 (1974).

Bradley contends, relying on Toto, supra, that the above language of the Joint Conference Committee report requires a construction of Rule 609(a)(2) which precludes the use of petit larceny convictions for impeachment purposes. To the contrary, however, the pertinent legislative history makes clear that Congress employed the "dishonesty and false statement" language intending that it be construed, with an appreciation of and consonant with the fact that crimes of theft have long been recognized -- by this and other Circuits (although not the Third)-- to involve the trait of dishonesty, and that a conviction of any such crime is particularly probative of "the accused's propensity to testify truthfully."

The scope of the phrase "dishonesty and false statement" was the subject of much debate in Committee and on the floor of the House of Representatives.* A matter of some concern to the Congress was the wide variation, among jurisdictions, in the scope of the term "crimen falsi" and the use of evidence of such crimes to impeach witnesses. See 120 Cong. Rec. H. 310 (daily ed. January 30, 1974). During the debate, discussion

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* For a complete discussion of the evolution of Rule 609(a), See 3 Weinstein's Evidence, United States Rules, ¶ 609[01].

among Representatives Danielson, Hogan, and Dennis made clear that the House consciously chose to include crimes of theft in the phrase "dishonesty and false statement" and therefore rejected the rulings of those jurisdictions, including the Third Circuit, which more narrowly restricted the definition of "crimen falsi."* 120 Cong. Rec. H.555-556 daily ed. February 6, 1974)

Subsequently, Representative Hungate, when the Conference Committee Report reached the floor of the House, explicitly stated that the Conference Committee version of the Rule, with respect to the use of evidence of convictions of a crime involving honesty or false statement, "constitutes no change from either the House or the Senate version." 120 Cong. Rec. H. 12254 (daily ed. Dec. 18, 1974).

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* It should be noted that the House version of Rule 609(a) restricted the use of convictions for impeachment purposes to those "crimes which involve dishonesty and false statement." 3 Weinstein, supra, pp. 609-13, 609-33.

Rule 609(a), as finally enacted, appears to have adopted the approach of developing D. C. Circuit and Second Circuit case law, beginning with Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).* Those cases have discussed at length the way in which convictions of crimes involving dishonesty and false statement bear on credibility.

Thus, in Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied 390 U.S. 1029 (1968) the Court said:

> In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence, on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity, A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . . (footnote omitted).

* In Luck the D. C. Circuit articulated for the first time the rule which permitted the trial Judge, if the defendant testified, to use his discretion to exclude impeachment evidence of convictions of prior crime, weighing probative value against prejudice to the defendant. This modified the prior rule which held a defendant, like any other witness, broadly subject to cross examination.

This "rule of thumb" was expressly adopted by the Second Circuit in United States v. Palumbo, 401 F.2d 270, 274 (2d Cir. 1968) cert. denied, 394 U.S. 947 (1969), which held that impeachment by inquiry into a larceny conviction was permissible. It was applied again in United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970) cert. denied 402 U.S. 950 (1971) where this Court held that a larceny conviction "reflect(ed) on honesty and integrity and thereby on credibility." And in United States v. Zubkoff, 416 F.2d 141 (2d Cir. 1969), this Court held that to permit impeachment of a defendant by evidence of a 1940 conviction for petit larceny was not reversible error, despite the remoteness of the conviction,

Furthermore, in United States v. De Angelis, 490 F.2d 1004, 1009 (2d Cir.), cert. denied 416 U.S. 956 this Court upheld the use, for impeachment of a defendant, of a misdemeanor conviction for interstate transportation and possession of untaxed cigarettes - - ruling that such a crime related to "honesty and integrity."

Thus, Rule 609(a) as finally adopted essentially incorporated rather than changed the existing law in this Circuit.* The discussion in Congress, during the evolution of the Rule, clearly shows that crimes of dishonesty, such as larceny, were intended to be included with in the scope of 609(a)(2). The trial court was, therefore, entirely correct in ruling that Bradley's 1969 petit larceny conviction could properly be used for purposes of impeachment.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America,

CONSTANCE CUSHMAN,
John C. Sabetta,
Assistant United States Attorneys,
Of Counsel.

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* In contrast, and as Toto, supra, and Testamark, supra, make clear, the rule in the Third Circuit prior to the advent of the new Federal Rules of Evidence precluded impeachment of a defendant by use of his prior petit larceny conviction. It is hardly surprising then that the Third Circuit, limiting its appraisal of the legislative history to the Joint Conference Committee Report, would choose to construe Rule 609(a)(2) in conformity with its own precedents.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Constance Cushman , being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of April , 197 , he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Martin Jay Siegel, Esq.
1140 Avenue of the Americas
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Constance Cushman

Sworn to before me this

14th day of April

Iola Walker

IOLA WALKER
Notary Public, State of New York
No. 52-4131670
Qualified in Suffolk County
Certificate filed in New York County
Term Expires March 30, 1977